NO. 81006-1

SUPREME COURT OF THE STATE OF WASHINGTON

AT&T CORP,

Appellants,

v.

MICHAEL McKEE,

Respondent.

BRIEF OF *AMICUS CURIAE* ATTORNEY GENERAL OF WASHINGTON

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I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest. *See Young Americans for Freedom v. Gorton,* 91 Wn.2d 204, 212, 588 P.2d 195 (1978). This case includes the question of whether the Federal Communications Act ("FCA"), 48 Stat. 1064 (codified, as amended, at 47 U.S.C. § 151, *et seq.*), preempts state consumer protection and contract laws. This question affects the public interest because it will influence the extent to which the Washington Consumer Protection Act ("CPA"), RCW 19.86, protects consumers from unfair and deceptive acts or practices in the marketplace.

The Attorney General is authorized to protect Washington consumers and businesses from unfair and deceptive acts or practices in trade or commerce. RCW 19.86.080. As the state agency charged with directly enforcing the CPA, the Attorney General has an interest in the development of CPA case law in Washington. The Legislature intends that the Attorney General will have the opportunity to participate in such cases, as evidenced by the statutory requirement that the Attorney General be served with any complaint for injunctive relief under the CPA and with any appellate brief that addresses any provision of the CPA. RCW 19.86.095. The Attorney General therefore offers its views regarding federal preemption by the FCA of Washington state consumer

protection and contract laws to assist the Court in the resolution of this important issue.

II. DECISION BELOW

The decision below is *McKee, et al. v. AT&T Corp,* , Order Granting Plaintiff's Motion to Stay Arbitration and Denying Defendant's Motion to Compel Arbitration, No. 03-2-00133-8, Chelan County Superior Court (July 19, 2005).

III. ISSUE PRESENTED BY *AMICUS*

Whether Washington consumer protection and contract laws obstruct the achievement of the purposes and goals of §§ 201 and 202 of the FCA such that Washington's laws protecting consumers from unfairness and deception in a competitive marketplace are preempted.

IV. STATEMENT OF THE CASE

Plaintiff-respondent Michael McKee represents a putative class of Washington residents who have been long-distance telephone customers of AT&T Corp. ("AT&T") and who allegedly were charged an improper utility tax surcharge after August 31, 2001 or were subject to a monthly late fee of 1.5% of their outstanding balance due. McKee filed this case in superior court on February 3, 2003, alleging violations of Washington's CPA, RCW 19.86, and Usury Act, RCW 19.52, as well as common-law claims. CP 1281-97, 838-48.

On October 24, 2003, AT&T moved to compel McKee to arbitrate his claims individually, claiming that McKee was bound by an arbitration clause included in a Customer Service Agreement ("CSA") that AT&T

claimed had been mailed to McKee as part of a "fulfillment package" after he ordered AT&T service. CP at 1127–28, 1114-15.

On June 18, 2004, the trial court orally denied AT&T's Motion to Compel Arbitration. RP 13-14. The court held that:

1) Washington, not New York, law governs the enforceability of the mandatory arbitration clause in AT&T's CSA (RP 1 at 8-9);

2) the CSA's "length and complexity," "fine print," "concealment of important terms," and adhesive nature render it procedurally unconscionable (RP 1 at 10-11); and

3) the arbitration clause is substantively unconscionable (RP 1 at 11) the FCA does not preempt McKee's state-law unconscionability claims (RP 1 at 15-16).

On July 19, 2005, the trial court entered an order adopting the findings of fact and conclusions of law of its oral decision. CP 48–49.

AT&T appealed on December 7, 2005, to the Washington Court of Appeals, Division III. On December 26, 2007, after briefing was complete, including supplemental briefing in light of this Court's decisions in *Scott v. Cingular Wireless LLC,* 160 Wn.2d 843, 161 P.3d 1000 (2007), and *Dix v. ICT Group*, 160 Wn.2d 826, 161 P.3d 1016 (2007), the Court of Appeals certified the case to the Washington State Supreme Court, and on January 2, 2008, the Supreme Court accepted review.

V. ARGUMENT

The issue of whether the FCA preempts state consumer protection and contract laws was considered and correctly decided five years ago by the Ninth Circuit Court of Appeals in *Ting* v. *AT&T Corp.*, 319 F.3d 1126, 1137, 1143 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003). In that case, AT&T forwarded much the same argument as it is making to this Court. It argued that the FCA impliedly preempts state consumer protection and contract laws because the goals of the FCA, even after the Federal Communications Commission ("FCC") ordered detariffing in 1996, are to maintain uniformity of rates, terms, and conditions to long-distance carriers' consumer contracts and to achieve this by having a uniform federal standard that is enforced solely by the FCC. The Ninth Circuit, in a considered and detailed opinion, rejected AT&T's argument entirely. The Ninth Circuit's decision is comprehensive, with a breadth and depth of analysis unmatched by the decision AT&T contends is the leading case on preemption under the FCA, *Boomer v. AT&T Corp.*, 309 F.3d 404 (2002).

The Ninth Circuit examined the FCA's text, application, history, and interpretation thoroughly before reaching its conclusion that the FCA, after detariffing, no longer preempts state laws in claims arising from the rates, terms, and conditions of a long-distance carrier's customer contract. In its decision, the Ninth Circuit considered and rejected the Seventh Circuit's reasoning and conclusions in *Boomer* finding critical gaps in that court's analysis of the FCA. *Ting*, 319 F.3d at 1135. Significantly, the

U.S. Supreme Court declined to review the *Ting* decision. The Attorney General urges this Court to follow the Ninth Circuit's well-reasoned and thoughtful opinion and affirm the trial court's decision.

A. The Consumer Protection Act Serves a Vital Function in Redressing Unfair and Deceptive Practices in an Unregulated, Competitive Marketplace.

The CPA's purpose "is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; *see also Fisher v. World Wide Trophy*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976). The CPA provides both the Attorney General and private citizens with the vehicle to obtain relief from unfairness and deception in the marketplace, including obtaining injunctions prohibiting the unfair or deceptive practices. RCW 19.86.080, .090. Without the application of our State's consumer protection and contract laws to long-distance carriers' contract terms that affect the public interest and implicate important state policies, consumers will be left without an adequate avenue of relief and long-distance carriers, unlike any other businesses contracting with Washington consumers in a competitive marketplace, will be able to engage in practices that violate Washington's consumer protection laws and public policies.

B. Washington's CPA and Contract Laws Are Not Preempted Because They Do Not Conflict With the FCA.

AT&T argues that the FCA "demonstrates a congressional intent that customers receive uniform terms and conditions of service," and that to achieve such uniformity, it is Congress' and the FCC goal to create a federal, uniform standard for determining the validity of the rates, terms, and conditions of carriers' contracts. AT&T's Opening Brief at 19-20. AT&T contends that Washington's consumer protection and contract laws are impliedly preempted by the FCA because they "stand as an obstacle to the accomplishment and execution of Congress' and the FCC's purpose and objective of creating a federal, uniform standard for determining the validity of long-distance service contract rates, terms and conditions." AT&T's Opening Brief at 20.

A party arguing in favor of federal preemption of a state law bears a heavy burden. *See Medtronic* v. *Lohl,* 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d. 700 (1996). The police powers of the states are not to be superseded by federal law unless it is the clear and manifest purpose of Congress to do so. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Conflict preemption is found where it is impossible to comply with both state and federal law, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). Under the obstruction strand of conflict preemption, an aberrant or hostile state

rule is preempted to the extent it actually interferes with the "methods by which the federal statute was designed to reach [its] goal." *Ting*, 319 F.3d at 1137, 1143 (*quoting Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 494, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)). Obstruction preemption focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law's text, application, history, and interpretation. *Ting*, 319 F.3d at 1137. The question is whether Congress' goals are "truly being frustrated." *Id.* at 1141.

Just as it failed to persuade the Ninth Circuit in *Ting*, AT&T has failed in this case to show (1) that Congress intended, after detariffing, that long-distance carriers were to offer uniform rates, terms, and conditions to their customers; (2) that Congress intended for there to be a uniform, federal standard for determining the validity of carriers' rates, terms, and conditions; and (3) that state consumer protection and contract laws obstruct the accomplishment of the purposes of Congress to protect consumers from unjust, unreasonable, and unreasonably or unduly discriminatory rates, terms, and conditions in enacting §§ 201 and 202 of the FCA. As the *Ting* court stated, uniformity of rates, terms, and conditions was a requirement of the former monopoly-based filed-rate regime, and the FCC was fulfilling the intent of Congress when it authorized detariffing in 1996 to permit carriers to compete in the market by setting their own competitive rates, terms, and conditions. *Ting*, 319 F.3d at 1141. In issuing its order of mandatory detariffing on October 29, 1996, the FCC confirmed that enforcement of the tariffing provision

was neither necessary to ensure just and reasonable, non-discriminatory rates, nor necessary for the protection of consumers. Second Report and Order, 11 F.C.C.R. 20,730, ¶21 (1996).

Significantly, the *Ting* court also explained that the market-based method of achieving the Act's goals of reasonableness, fairness, and nondiscrimination in carrier contracts does not require a uniform, federal standard but rather "depends in part on state law for the protection of consumers in the deregulated and competitive marketplace." *Id.* And the *Ting* court correctly determined that rather than obstructing the purposes and objectives of the FCA, state laws are an integral part of the fulfillment of Congress' goals of maintaining reasonable, fair, and nondiscriminatory rates, terms, and conditions in a competitive marketplace. *Id.*

One of the most important points underpinning the *Ting* decision – and one that is missing from AT&T's argument before this Court – is that the objectives and purposes of §§ 201 and 202 are *to protect consumers* from unfair, unreasonable, and unreasonably or unduly discriminatory rates, terms, and conditions in long-distance carriers' contracts. AT&T conflates the goal with the method. The *Ting* decision expertly separates the two, which is critical to an obstruction-strand conflict-preemption analysis: "In order to determine whether Congress' goals are truly being frustrated, the obstruction inquiry examines congressional purpose, as well as the method chosen by Congress to effectuate that purpose. It is this second element that Congress altered in the 1996 Act." *Id.* (citations omitted).

1. Both the FCA and Washington's Consumer Protection and Contract Laws Have the Purpose to Protect Consumers From Unjust, Unreasonable, and Unreasonably Discriminatory Contract Rates, Terms, and Conditions.

The goal and purpose of the CPA is to "protect the public and foster fair and honest competition." RCW 19.86.920. Therefore, the CPA prohibits "unfair or deceptive acts and practices in the conduct of any trade or commerce." RCW 19.86.020. The legislature also intended that the CPA "not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest." RCW 19.86.920. Thus, the CPA's objective is to protect the public and the competitive marketplace from unreasonable, unfair, and deceptive acts or practices.

Similarly, Congress' purpose in enacting §§ 201 and 202 was to protect consumers from unreasonable, unfair, and unreasonably or unduly discriminatory rates, terms, or conditions in long-distance carriers' service contracts. 47 U.S. §§ 201(b), 202(a). Sections 201(b) and 202(a) unquestionably evince a congressional intent that customers receive fair and reasonable rates from telecommunications carriers. *Ting*, 319 F.3d at 1138. Sections 201 and 202 contain the "substantive principles of reasonableness and nondiscrimination." *Id.* at 1139. Senator Slade Gorton succinctly summarized the goals of the FCA when he stated that the Telecommunications Act would allow "[s]tates to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights

of consumers, which are, of course, the precise goals of this Federal statute itself." 141 CONG. REC. S8206-02, S8212 (daily ed. June 13, 2005)(Statement of Sen. Gorton). Thus, the FCA shares the same fundamental purposes and goals as Washington's consumer protection and contract laws.

2. Washington's Consumer Protection and Contract Laws Are Necessary to the Accomplishment and Execution of the FCA.

Washington's consumer protection and contract laws are compatible and consistent with the purposes of §§ 201 and 202 of the FCA, and therefore, are not preempted by either of these provisions. Rather than generating conflict, state law is actually necessary to carry out the full purposes and intent of Congress and the FCC to protect consumers in the detariffed marketplace. *Ting*, 319 F.3d at 1144. "In the absence of significant conflict between federal policy and the use of state law, we hold that state contract and consumer protection laws form part of the framework for determining the rights, obligations, and remedies of the parties to the [customer service agreement of AT&T]." *Ting*, 319 F.3d at 1146.

a. When it authorized detariffing, Congress emphasized the importance of the protection of consumers in a competitive marketplace.

Prior to detariffing, "rate filing was Congress' chosen means of preventing unreasonableness in discrimination in charges." *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 230, 114 S. Ct.

2223, 129 L .Ed. 2d 182 (1994). In the filed-tariff environment, consumers were, in theory, protected from unjust, unreasonable, or discriminatory rates, terms, and conditions by the FCC's prior determination that the carrier's filed rate was "just" and "reasonable" and not unreasonably or unduly discriminatory. Once a tariff was approved by the FCC, it then carried the force of law and became binding on both the consumer and the carrier. *Brown v. MCI Worldcom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002). Consumers were therefore protected, in theory, when they became subscribers of long-distance carriers because the FCC had already determined that the carriers' rates complied with §§ 201 and 202 of the FCA. Congress' fundamental purpose in enacting the Telecommunications Act was to replace the old monopoly-based regime with one based on market competition. *Ting*, 319 F.3d at 1141. Thus, when Congress authorized the FCC to eliminate the filing requirement, it permitted the rate-filing mechanism to be replaced by a market-based mechanism in the form of individual negotiated contracts between carriers and their customers. *Id.* Unlike rate-filing, however, this market-based mechanism depends in part on state law for the protection of consumers in the deregulated and competitive marketplace. *Id.* The *Ting* court correctly concluded that this dependence "creates a complimentary [sic] role between federal and state law under the 1996 Act." *Id.*

In amending the FCA, Congress' purpose and goal of the FCA continued to be the protection of consumers and the public interest. 47

U.S.C. § 160(a). What Congress changed was the method by which the goal would be accomplished. The enduring goal would no longer be achieved through filed tariffs, but instead would be achieved through individual contracts between carriers and consumers that would be governed by market forces. Notice of Proposed Rulemaking, 11 F.C.C.R. 7,141, ¶¶ 30-31 (1996); *see also Ting*, 319 F.3d at 1141-46 (lengthy discussion of changes in regulatory scheme post-detariffing). "By definition, the deregulated marketplace encompasses state laws of general applicability. State contract and consumer protection laws, including ... unconscionability law, form part of the competitive framework to which the FCC defers." *Ting*, 319 F.3d at 1145.

This Court is asked to determine whether Washington's CPA and contract law obstruct the achievement of Congress' goal and purpose in enacting §§ 201 and 202 to protect consumers from unfair and unreasonable rates, terms, and conditions in carrier contracts. The Attorney General asks this Court to uphold the vital role of state laws in vindicating the rights of consumers who have been subjected to unreasonable and unfair rates, terms, and conditions in the contracts of long-distance carriers in a competitive marketplace.

b. The principle of preemption implied by the uniformity requirement in § 203 of the FCA did not survive after the FCC ceased enforcing § 203 and ordered mandatory detariffing.

Congress did not explicitly preempt state law in the FCA, but rather included a Savings Clause. *See* 47 U.S.C. § 414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."). The principle of preemption in the FCA has always been derived from § 203 and the filed-rate doctrine. *Ting*, 319 F.3d at 1138. As the *Ting* court points out, "nearly 70 years of case law plainly demonstrates that the principle of uniformity is not derived from § 202(a) alone [the fairness and reasonableness requirement], but from the mandate to publish rates *together with* the discrimination principles reflected in §§ 201(b) and 202(a))." *Ting*, 319 F.3d at 1137 (citing *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223, 118 S. Ct. 1956, 141 L. Ed.2d 222 (1998); *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 230, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994)). AT&T cannot point to anything in the text of §§ 201 or 202 that implies a congressional goal for a uniform, federal standard for determining the rates, terms, and conditions of carriers' service contracts. AT&T cites only to *Boomer* as authority for its contention that the purpose and objective of the FCA is to create a uniform, federal standard for determining the validity of long-distance carriers' rates, terms, and conditions in a detariffed setting. AT&T's Opening Brief at 20. However, the court in *Boomer* offered

nothing more than the text of the statute to support this conclusion. *Boomer*, 309 F.3d at 420. The court in *Ting* rejected *Boomer*'s conclusion for its lack of analysis: "A finding of obstruction...depends on more than mere identification of favorable text... In order to determine whether Congress' goals are truly being frustrated, the obstruction inquiry examines congressional purpose, as well as the method chosen by Congress to effectuate that purpose." *Ting*, 319 F.3d at 1142 (citing *Ouellette*, 479 U.S. 494, 107 S. Ct. 805).

AT&T contends that the only state laws applicable to its contracts are those that determine whether a contract has been formed. However, the *Ting* court properly rejected this argument after a lengthy review of the FCC rulemaking record. *Ting*, 319 F.3d 1126 (2003)(comprehensive review of FCC comments, orders, and statements).

With the paradigm shift from a tariffed-rate regime to a competitive market, there is "no reason to imply a conflict between otherwise complimentary [sic] state and federal laws." *Id.* at 1143. "In deregulated markets, compliance with state law is the norm rather than the exception." *Id.* AT&T has not met its burden of proving that state consumer protection and contract laws obstruct Congress' goal of ensuring that carriers provide consumers with reasonable, fair, and nondiscriminatory rates, terms, and conditions in a competitive market.

c. Long-distance carriers can comply with both the FCA and state laws.

AT&T argues that without "a uniform body of federal law under the FCA and its standards, providers such as AT&T must guess whether each provision satisfies the laws of all fifty states." AT&T's Opening Brief at 25. Remarkably, all other unregulated companies doing business in all fifty states are required to comply with the various applicable laws in each of the fifty states. AT&T can comply with both the FCA and state consumer protection and contract laws. The ability to comply with both federal and state laws demonstrates that the State's laws do not obstruct the goals of the FCA. Section 201 of the FCA states that "[all] charges, practices, clarifications, and regulations ... shall be just and reasonable." 47 U.S.C. § 201(b) (2001). This requirement is entirely consistent with state consumer protection and contract laws. If it chose to, AT&T could enter into "just and reasonable" contracts that comply with state consumer protection and contract laws. Section 202, which prohibits any "undue or unreasonable preference or advantage to any particular person, class of persons, or locality," is not obstructed by state contract and consumer protection laws because long-distance carriers can create agreements that comply with both § 202 and state laws. Nothing prevents AT&T from creating a new customer service agreement (CSA) with fair and reasonable terms that are consistent with the state laws in all the states in which it operates, and then offering that new CSA to its customers nationwide. AT&T's obstruction argument fails.

d. This Court Should Reject the Seventh Circuit's Analysis in *Boomer v. AT&T.*

AT&T asks this Court to follow the ruling in *Boomer*. As the *Ting* court found, the *Boomer* opinion was wrongly decided. First, the *Boomer* court's conclusion that state consumer protection and contract laws continue to be impliedly preempted by the FCA rests on the incorrect premise that after detariffing the FCA still requires uniformity of rates, terms, and conditions in carriers' customer contracts. *Boomer*, 309 F.3d at 418. As the *Ting* court showed, in authorizing detariffing, Congress' intent was to replace the filed-tariff mechanism, which *did* require uniformity in carriers' rates, terms, and conditions, with a market-based mechanism, which necessary permits – indeed encourages – setting competitive rates, terms, and conditions. *Ting*, 319 F.3d at 1141.

Second, as noted above, the *Boomer* decision fails to conduct an obstruction analysis prior to reaching its conclusion that §§ 201(b) alone implies that federal law must govern the validity of the rates, terms, and conditions of carriers' customer contract. *Supra* at 15 (citing *Ting,* 319 F.3d at 1141).

And finally, the *Boomer* court fails to show how the application of state laws with different, but reasonable, fair, and not unreasonably discriminatory, standards would obstruct the goal of ensuring that carriers' rates, terms, and conditions are reasonable, fair, and not unreasonably or unduly discriminatory. The *Boomer* decision ignores the vast majority of

what the FCC has said about the role of state law in giving effect to the requirements under §§ 201 and 202 of the FCA. The *Ting* court, on the other hand, examined and discussed in detail numerous statements and findings by the FCC, which supported the conclusion that state law has an important role in ensuring the requirements of §§ 201 and 202 are met. *See Ting*, 319 F.3d 1126 (2003).

VI. CONCLUSION

For the foregoing reasons, the Attorney General of Washington respectfully requests that this Court follow the Ninth Circuit in *Ting* and hold that Washington's consumer protection and contract laws are not preempted by the FCA.

RESPECTFULLY SUBMITTED this 12th day of February, 2008.

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